LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 1 1966
JOHN F. DAVIS, CLERK

No. 317

Supreme Court of the United States

OCTOBER TERM, 1966

JOHANNAH H. WIENRANK, ET AL.,
Petitioners,

vs.

NORTHERN ILLINOIS GAS COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois For The Third District

---

BRIEF FOR RESPONDENT IN OPPOSITION

JUSTIN A. STANLEY
ROBERT A. HELMAN
JAMES E. KNOX, JR.
DAVID L. LANGE
ISHAM, LINCOLN & BEALE
72 West Adams Street
Chicago, Illinois 60603
Counsel for Respondent

McCORMICK & HENDERSON, INC., CHICAGO

INDEX

	PAGE
Statement	1
Questions Presented	3
Argument	4
Conclusion	11

CITATIONS

Cases

Bauman v. Ross, 167 U.S. 548 (1897)	4
Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359 (1948)	8
Lynch v. New York *ex rel.* Pierson, 293 U.S. 52 (1934)	8
Midwestern Gas Transmission Co. v. Mason, 31 Ill.2d 340, 201 N.E.2d 379, *appeal dismissed & cert. denied,* 380 U.S. 124 (Oct. Term 1964, No. 759)	6-7
Peoples Gas Light & Coke Co. v. Buckles, 24 Ill.2d 520, 182 N.E.2d 169, *appeal dismissed & cert. denied,* 371 U.S. 185 (Oct. Term 1962, No. 442)	6, 8
Roberts v. City of New York, 295 U.S. 264 (1935)	4
United States v. Twin City Power Co., 350 U.S. 222 (1956)	8
United States *ex rel.* T.V.A. v. Powelson, 319 U.S. 266 (1943)	6

Constitution and Statutes

Illinois Constitution, art. II, § 13	2
Illinois Eminent Domain Act, Ill. Rev. Stat. ch. 47, § 1 (1965)	2

Supreme Court of the United States

OCTOBER TERM, 1966

No. 317

JOHANNAH H. WIENRANK, ET AL.,
Petitioners,

vs.

NORTHERN ILLINOIS GAS COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois For The Third District

BRIEF FOR RESPONDENT IN OPPOSITION

Statement

Respondent, a public utility engaged in the distribution of natural gas, is seeking to develop an underground reservoir for the storage of such gas. The essence of the reservoir is an impermeable cap rock which gradually slopes downward over an area of several thousand acres to form a dome or inverted saucer more than 590 feet below the surface of the ground. The gas is injected

through the cap rock, known as Maquoketa shale, into the underlying porous formations where it displaces a portion of the water in these formations and is held in place by the sides and top of the cap rock dome and the water pressure beneath it. (Abst. 64-66; Add. Abst. 4-5.)

The instant case is an eminent domain action brought by respondent under the Illinois Eminent Domain Act to acquire the right to store gas in that part of the reservoir which underlies petitioners' land. No rights are sought on the surface of their land, for the necessary injection, withdrawal and observation wells are located elsewhere. (Abst. 217.)

In accordance with the Constitution and statutes of Illinois, Ill. Const. art. II, § 13; Ill. Rev. Stat., ch. 47, § 1 (1965), the question of the compensation to be paid petitioners for the taking of such right was submitted to a jury of twelve. At the conclusion of a trial, at which 18 witnesses testified over a period of nearly two weeks, the jury was instructed to compensate petitioners "for the diminution in the fair cash market value of . . . [their] lands by reason of the taking of the underground gas storage easements." (Abst. 218.) The jury awarded petitioners $75 per acre. (Abst. 40, 232.)

In making such a determination the jury was instructed not to consider the value of petitioners' land as part of an underground gas storage dome or any effect of the possibility of leakage of the gas above the top of the storage dome. (Abst. 219, 221.) These considerations were excluded by the trial court on the basis of its conclusion that under the introduced and proffered evidence the possibility of such use or such leakage was too remote and speculative to be considered by the jury.

The jury was instructed that it should consider the loss of water below the cap rock in the storage dome and that it was "not necessary for the jury to find that underground water resources be used at the time of the taking in order to be compensated therefor." (Abst. 220.) The trial court rejected the testimony of two of the three "experts" offered by petitioners on the effect of the loss of such water because they had not been shown to be qualified to express opinions on this issue. (Abst. 126-30; Add. Abst. 25-26.) Publications offered by petitioners purportedly reporting facts pertaining to this issue were rejected as incompetent to prove the facts stated therein. (Abst. 131, 212.)

The Illinois Supreme Court declined to review these instructions and evidentiary rulings on the ground that such review would merely involve the application of settled principles to the particular facts of this case. 66 Ill. App. 2d at 64, 213 N.E. 2d at 413. (Pet. A4.) The case was transferred to the Appellate Court of Illinois for the Third District which determined that such principles had been applied correctly in this case. Petitioners are now asking this Court to review the Appellate Court's decision.

Questions Presented

1. Whether the evidence introduced and proffered in this case was sufficient to show (a) a reasonable probability that petitioners' land could be used without the exercise of the power of eminent domain as an underground gas storage reservoir, or (b) a reasonable possibility that the stored gas would escape above the cap rock.

2. Whether the rejected witnesses and publications offered by petitioners on the effect of loss of the water in the storage reservoir were shown to be competent on this issue.

Argument

The only questions presented are concerned with the application of accepted principles to the particular facts of this case. Petitioners do not quarrel with the conclusion that the use of their land as an underground gas storage reservoir can be considered only if there is a reasonable possibility or probability of using their individual parcels for such purpose or combining their land with the land of others to form the dome necessary to contain the gas; nor do petitioners quarrel with the conclusion that the effect of the possibility of leakage of the gas above the dome can be considered only if there is a reasonable possibility of such leakage. (Pet. 2-3; Statement, Brief and Argument of Appellants 65.) They merely dispute the correctness of the findings of the Illinois courts that the evidence introduced and proffered was insufficient to show such possibilities.[1]

Even if the court below erred in its evaluation of such evidence or the competency of the proffered evidence relating to the loss of water in the storage dome, which it did not, such errors would not give rise to substantial constitutional questions. In *Roberts* v. *City of New York*, 295 U.S. 264, 277 (1935), this Court stated:

> "Not every such mistake amounts to a denial of constitutional immunities, though the outcome is to give the owner less than he ought to have. In condemna-

[1] We do not interpret petitioners' arguments, here or below, as involving any claim that the jury, not the judge, should have made the initial determination on the sufficiency of the evidence to show the necessary foundation for consideration of these factors. Such a claim would be frivolous. Not only is the initial determination of such matters by the judge consistent with the normal judge-jury relationship in a common law jury trial, but, "[b]y the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury . . . ," *Bauman* v. *Ross*, 167 U.S. 548, 593 (1897).

> tion proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. . . . To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action."

In an effort to overcome these deficiencies in their case, petitioners attempt to inject the question of whether the State can exclude consideration of use of their land as an underground gas storage reservoir in determining the compensation to be awarded them on the ground that the State would not permit any possible user other than respondent to develop such a reservoir. Respondent did not advance such a ground before the Appellate Court (Brief of Appellees), and, as will be shown, the Appellate Court did not rely on such a ground. In short, that question is simply not involved in this case.

1. *Exclusion of consideration of value of underground gas storage reservoir.* The Appellate Court upheld the exclusion of consideration of the value of rights under petitioners' land for the purpose of an underground gas storage on the ground that the introduced and proffered evidence was insufficient to show either a reasonable possibility that the individual parcels could have been used as storage reservoirs[2] or a reasonable possibility that petitioners' land could have been combined with the land of others to form a dome sufficient to contain the gas.

---

[2] The only evidence proffered by petitioners on the use of individual parcels for underground storage concerned a reported Swedish technique utilizing high pressure water which petitioners' witness did not attempt to relate to petitioners' land. Indeed such witness did not indicate that this technique has successfully been utilized anywhere in the world. (Abst. 163, 167.) An expert offered by respondent testified that petitioners' land could not be used for underground gas storage other than in combination with the land of others to form the large storage dome which respondent is seeking to develop. (Abst. 66.)

A use of land conditioned on combining that land with the land of others can be considered in evaluating the land only if there is a reasonable probability that such combination can be effected without the exercise of the power of eminent domain. In *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 275-76 (1943), this Court stated:

> "An owner of lands sought to be condemned is entitled to their 'market value fairly determined.' *United States* v. *Miller,* 317 U.S. 369, 374. That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted. *Boom Co.* v. *Patterson,* 98 U.S. 403; *McCandless* v. *United States,* 298 U.S. 342. In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract. *McGovern* v. *New York,* 229 U.S. 363. But in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future. *Olson* v. *United States,* 292 U.S. 246, 255. In absence of such a showing, the chance of their being united for that special use is regarded 'as too remote and speculative to have any legitimate effect upon the valuation.' *McGovern* v. *New York, supra,* 229 U.S. p. 372."

Powelson was applied in the initial underground gas storage case in Illinois, *Peoples Gas Light & Coke Co.* v. *Buckles,* 24 Ill.2d 520, 534-40, 182 N.E.2d 169, 177-80, *appeal dismissed & cert. denied,* 371 U.S. 185 (Oct. Term 1962, No. 442). In the *Buckles* case consideration of the use of the land as part of an underground gas storage reservoir was rejected on the ground that there was no reasonable possibility of combining the typical farms there involved into the necessary 5,000 acre dome. This principle was reaffirmed in *Midwestern Gas Transmission Co.* v.

Mason, 31 Ill.2d 340, 342-43, 201 N.E.2d 379, 381, *appeal dismissed & cert. denied*, 380 U.S. 124 (Oct. Term 1964, No. 759). It was this principle which was applied by the Appellate Court in this case:

> "The land involved in the Petitioner's preliminary development of the project has a total area of about 5,300 acres. The parcels involved in the case before us total an area of 366.7 acres. The largest of the parcels is 120 acres in area and the largest contiguous area of any combination of the parcels is 160 acres with the smallest consisting of an area of 2 acres.
>
> * * * * *
>
> "[I]n both the Buckles and Mason cases . . . the court concluded that evidence of the value of small parcels of land for underground gas storage was too remote and speculative to be admitted or considered. . . . An examination of such cases and the facts and circumstances in the present case furnishes, we believe, no reasonable basis for overruling or distinguishing the principles announced in both the Buckles and Mason cases and we, therefore, believe that the Trial Court properly determined that evidence of the value of the parcels for underground gas storage was too remote and speculative to be admissible, particularly in view of the fact that there was no basis in the evidence to show that there was a reasonable possibility that the small parcels could be used as individual underground gas storage projects." 66 Ill. App. 2d at 67, 72-73, 213 N.E.2d at 414, 417. (Pet. A7, A18-19.)

Petitioners do not dispute the fact that the absence of a reasonable probability of combination prevents consideration of a combined use. They contend, however, that the Appellate Court upheld the exclusion of consideration of the use of their land as part of a storage reservoir on the ground that the State would not authorize anyone other than the respondent to develop the reservoir. This contention is based on the fact that such a rationale was

used as an alternative or cumulative reason for the exclusion of consideration of such use in the *Buckles* case, 24 Ill.2d at 534-40, 182 N.E.2d at 177-80, and the *Buckles* case was cited favorably in this case. At most, this suggests that such rationale was an alternative ground in the instant case. However, as shown by the above quote, the Appellate Court in this case did not rely on this rationale but instead relied on the impossibility of combination rationale of *Buckles*, as urged by respondent (Brief of Appellees 20). The inability to use the individual parcels as storage reservoirs and the relationship of the individual parcels to the total area needed to form the dome, the facts on which the Appellate Court based its decision, are relevant only to the impossibility of combination theory. In either event, any consideration of the effect to be given respondent's certificate from the State to develop the dome would be academic in this case.[3] Cf., *e.g.*, *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52 (1934).

---

[3] Parenthetically, it appears that this Court's exclusion in *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956), of consideration of use of land as a dam site in determining compensation on the ground that such use was subject to the consent of the United States, would support the exclusion here of consideration of use as a storage reservoir on the ground that such use was subject to the consent of the State. Certainly there is no basis for petitioners' assertion that *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359 (1948), is to the contrary. There the question was "whether the Federal Power Act had so affected the use or value of certain land for power site purposes as to render inadmissible expert testimony which gave recognition to that land's availability for a power site," and this Court simply held that "there is nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nationwide change in state laws." 335 U.S. at 361, 374. Implicit within this holding is the assumption that Congress could constitutionally prevent the consideration of such use. The Oklahoma court, in holding that the State of Oklahoma could not prevent such consideration, relied solely on that State's constitution. 335 U.S. at 371.

2. *Exclusion of consideration of effect of possibility of leakage.* Such consideration was excluded because the evidence introduced and proffered was insufficient to show a reasonable possibility that the gas would escape above the cap rock. Petitioners admit that the possibility of leakage must be reasonable before the effect of such a possibility can be considered. (Statement, Brief and Argument of Appellants 65.) They contend, however, that the Appellate Court improperly deferred to the previous finding of the Illinois Commerce Commission on this issue. (Pet. 27-28.) This is simply not true. The Appellate Court upheld the exclusion of consideration of this factor on the basis of its independent evaluation of the introduced and proffered evidence. The opinion of the Appellate Court states:

> "One of the Defendants' two technical witnesses expressed no opinion on the likelihood of gas leakage above the Maquoketa. The other witness who did assert that it would not be an impermeable caprock stated that he had not examined the cores taken from the Maquoketa in the Crescent City Field and admitted that he had previously testified in the Commerce Commission proceeding to the effect that he would not expect the gas to get through that shale to the surface as he felt it was a good tight rock. [Abst. 121-22; Add. Abst. 24-25.] Evidence concerning other unrelated gas storage projects, where no degree of similarity is shown, would not have been proper. It was indicated by the expert witnesses that each of the storage projects must be studied on its own merits and that caprock properties are not necessarily uniform from one aquifer project to another. [Add. Abst. 7, 24, 27.]" 66 Ill. App. 2d at 73-74, 213 N.E.2d at 418. (Pet. A14.)

As the Appellate Court pointed out, petitioners' present inability to show a reasonable possibility of leakage would not prejudice them in the future if such leakage does occur.

"It is axiomatic that if leakage does in fact occur in the future which causes damage outside the easement area, nothing in this proceeding would preclude recovery for such damage if the action for recovery is otherwise on a sound basis authorizing recovery." 66 Ill. App.2d at 77, 213 N.E. 2d at 419-20. (Pet. A18.)

3. *Rejection of unqualified experts on use of water below cap rock for irrigation.* Contrary to the suggestion of petitioners (Pet. 29), the issue of the effect of the loss of water below the cap rock upon present and future uses of petitioners' land was submitted to the jury and the jury's award of $75 per acre presumably was based on the effect of such loss. Petitioners' valuation experts were permitted to take this factor into consideration in estimating the damages that would be sustained by petitioners. (Abst. 200, 202-03, 206-07.) Petitioners and another farmer were permitted to testify about the possibilities of irrigation. (Abst. 123, 175-76, 194-95.) Contrary to the statement by petitioners (Pet. 13-15), their witness Bays was permitted to testify about the supply of water above the cap rock and the amount of water needed for irrigation. (Abst. 158-60.) (An objection was sustained to his repetitive conclusion that the water supply above the cap rock would not support irrigation.) Two other experts offered by petitioners (Hoekstra and Smith) were not permitted to testify simply because they had not been shown to be qualified on this issue. As pointed out by the Appellate Court:

> "The witness [Hoekstra] had testified that he was a vegetable and grain farmer and irrigates his farm and there was no evidence as to the similarity of the particular land to farms which the witness had seen which might have been irrigated or to his own farm nor was he an expert on irrigation in any respect.

[Add. Abst. 26; Abst. 127-30.] Similarly, another witness [Smith] who was asked his opinion as to the adequacy of the glacial drift water supply to support irrigation, had indicated that he had made no specific studies of ground water reserves in the county. [Add. Abst. 25; Abst. 126-27.]'' 66 Ill. App.2d at 75, 213 N.E. 2d at 418 (Pet. A16.)

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JUSTIN A. STANLEY
ROBERT A. HELMAN
JAMES E. KNOX, JR.
DAVID L. LANGE
ISHAM, LINCOLN & BEALE
72 West Adams Street
Chicago, Illinois 60603
Counsel for Respondent

July 29, 1966